IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID JOHN VERNON, Appellant.	No. 40110-0-II UNPUBLISHED OPINION

Johanson, J. — A jury found David John Vernon guilty of two counts of voyeurism. He appeals, arguing that: (1) the trial court abused its discretion in admitting evidence of his 2003 voyeurism conviction under ER 404(b); (2) sufficient evidence does not support his convictions without the ER 404(b) evidence; (3) the Lewis County judges should have recused themselves; (4) he received ineffective assistance of counsel when trial counsel did not object to testimony or request a change of venue; (5) his jury was biased because a juror mentioned that he had seen Vernon's name on a "jail roster"; (6) the sentencing court had no authority to impose an exceptional, consecutive, determinate sentence under former RCW 9.94A.712 (2006);[1] (7) the

[1] Vernon's judgment and sentence cites to RCW 9.94A.507 as the applicable sentencing statute. But the legislature's recodification and amendment of former RCW 9.94A.712 did not come into effect until August 1, 2009. Laws of 2008, ch. 231, § 61. Vernon's date of crime is June 14, 2009 and, thus, former RCW 9.94A.712 is the applicable sentencing statute in this case.

sentencing court erred in imposing several community custody conditions; and (8) the sentencing court abused its discretion in imposing legal financial obligations. We remand for resentencing because the sentencing court erred by imposing a determinate sentence and including a community custody provision prohibiting contact with minor children. In all other respects, we affirm.

FACTS

On June 14, 2009, Kassandra Schoelkopf, her husband Kirk, and her in-laws, Jerry and Becky Schoelkopf, stopped at the Tanendum Campground to fish. Becky[2] and Jerry arrived first. Becky saw a row of port-a-potties and decided to use the facility. The facility she used had another unit adjacent to it. When they initially arrived at the campground, Becky had noticed a man later identified as David Vernon sitting in his truck parked by the facility. As she approached the toilets, Vernon was no longer sitting in his truck.

Becky entered the facility and noticed a hole in one of the walls. While standing, a person could see only the sky through the hole. But when seated on the toilet, a person could see into the adjacent facility. Becky noticed a piece of plastic, made of the same material as the wall and the same size as the hole, in the toilet before she sat down. While on the toilet, Becky saw movements at the hole, but she thought it was a tarp; she did not think it was a person. When she finished, she pulled up her pants and exited the facility.

Kassandra entered the facility immediately after Becky exited. When she entered, Kassandra noticed a hole in the top of one of the walls, but she did not think anything of it. As she squatted and started to pull down her underwear, she saw a head through the hole. The head

[2] We refer to the Schoelkopfs by their first names to avoid confusion and intend no disrespect.

was behind a mesh screen in the adjacent facility. Kassandra got up to investigate, looked closer, and confirmed that someone was looking at her. She saw eyes, a nose, and a head through the hole. Kassandra then pulled up her pants, ran out of the unit, and told her husband that someone had been watching her. They watched the adjacent facility closely and attempted to coax Vernon out by calling him names. Eventually Vernon exited the adjacent facility and verbally confronted Kirk over the name calling. When Vernon finally drove away, the Schoelkopfs copied down his license plate number and called the police.

Deputy Brady Taylor responded. He noted that in the adjacent facility, if you looked directly through the hole, you could see only the wall of the facility used by Kassandra and Becky. But if you stood on the shelf that the toilet seat sits on and looked through the hole at a downward angle, you could see the lid and part of the toilet seat in the adjacent facility. There was no tarp covering the hole in the facility, no indication that something had been taped there, and nothing lying on the ground between the two facilities.

Deputy Taylor contacted Vernon, who denied cutting the hole or looking through it. He also denied accidentally looking or accidentally doing anything. But Vernon did admit having a Leatherman tool with him that day.

The State charged Vernon with two counts of voyeurism, count I for Kassandra and count II for Becky. Before trial, the trial court granted the State's ER 404(b) motion to admit evidence of Vernon's 2003 voyeurism conviction to show motive, intent, preparation, plan, and absence of mistake. At trial, witnesses testified to the facts above. In addition, Ruth Aetzel, the victim from the 2003 crime, testified that in June 2003, she entered the Chehalis post office. While preparing

her materials for mailing, Vernon came up behind her and seemed to drop something. Aetzel looked down and saw that Vernon was holding his wallet between her legs and the wallet had a mirror where a driver's license would normally be kept. Aetzel could see in the mirror and saw that it was pointing between her legs.

The jury found Vernon guilty on both counts. The trial court imposed an exceptional sentence of two consecutive 60-month sentences and $4,429 in legal financial obligations. Vernon appeals.

ANALYSIS

I. ER 404(b) Prior Bad Acts Evidence

First, Vernon argues that the trial court abused its discretion by admitting evidence of his 2003 voyeurism conviction. Assuming without deciding that admission of the evidence was error, any error was harmless under these facts.

Any error admitting prior misconduct evidence is harmless unless the reviewing court finds that within reasonable probabilities the outcome of the trial would have differed if the error had not occurred. *State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996).

A person commits voyeurism, as charged here, if, for the purpose of arousing or gratifying the sexual desire of a person, he or she knowingly views another person without that person's knowledge and consent while the person being viewed is in a place where he or she would have a reasonable expectation of privacy. RCW 9A.44.115(2)(a).

Here, it is unlikely that the outcome would have differed without Aetzel's testimony. The jury heard that a hole was cut in the facility that Kassandra and Becky used in such a way that,

looking downward into that facility from the mesh air vent of an adjacent facility, a person could see the toilet seat area. Vernon had a Leatherman tool with him that day. Becky saw Vernon in his truck parked by the facilities when she arrived, but by the time she entered, he was no longer in his truck. Becky thought she saw something move but did not know what it was. Deputy Taylor confirmed that there was no tarp or anything attached to the facility, or on the ground, that might have flapped. Deputy Taylor testified that one had to stand on the toilet seat shelf to see the adjoining toilet seat through the hole.

Kassandra entered the facility immediately after Becky. As she squatted, she noticed a face peering at her through the hole in the wall. The face appeared to be in the adjacent unit. She inspected further, verified that someone was indeed watching her, and immediately exited the facility. Kirk and Becky watched the adjacent facility closely and eventually saw Vernon exit it. Given the strength of the State's evidence we hold that within reasonable probabilities the trial outcome would not have differed without Aetzel's testimony.

II. Sufficiency of the Evidence

Second, Vernon argues that, without the ER 404(b) evidence, there was insufficient evidence to support his conviction. He argues that without the ER 404(b) evidence, the jury would not have found various witnesses' testimonies credible. Here, Vernon's arguments are not insufficiency arguments. Instead, they are all challenges to the witness's credibility and the evidence's persuasiveness. We do not review these matters on appeal. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). In addition, for the reasons explained in the harmless error analysis above, sufficient evidence supported Vernon's convictions. *State v. Green*, 94

Wn.2d 216, 221-22, 616 P.2d 628 (1980) (sufficient evidence supports jury verdict if jury has a factual basis for finding each element proven beyond a reasonable doubt).

III. Judicial Recusal

Third, Vernon argues that he was denied an unbiased tribunal because all three Lewis County judges had some involvement with his prior criminal cases. Vernon waived any error by failing to object below. *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998) (appearance of fairness objection waived when not raised in the trial court).

IV. Ineffective Assistance of Counsel

Fourth, Vernon asserts that he received ineffective assistance of counsel. Vernon argues that trial counsel should have objected to Aetzel's testimony on the basis of collateral estoppel. Vernon claims that the State could not rely on Aetzel's testimony to prove his prior conviction because the State was collaterally estopped from doing so. He argues that his prior guilty plea satisfies the elements of collateral estoppel and, thus, the State had to prove his prior conviction by documentation. In addition, Vernon argues that his trial counsel should have sought a change of venue. Vernon does not cite any authority to support this argument. Without citation to authority, an appellant waives an argument or assignment of error. RAP 10.3(a)(6); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (court need not consider arguments that are not developed in the briefs and for which a party has not cited authority).

V. Impartial Jury

Fifth, Vernon argues that the trial court abused its discretion in denying his motion for a mistrial because the jury was allegedly tainted. He argues that juror 35, a person working in law

enforcement, prejudiced the jury. In addition, Vernon argues that the jury was prejudiced by the presence of a uniformed custody officer seated near him during voir dire. We disagree.

During voir dire, the following exchange occurred between the prosecutor and juror 35:

> [THE STATE]: The judge also inquired if anybody had heard of this matter, 35, you raised your hand on this.
> JUROR 35: Yes, I just saw a jail roster.
> [THE STATE]: Do you work in law enforcement?
> JUROR 35: (Nodding head)
> [THE STATE]: When did you see that?
> [DEFENSE COUNSEL]: Objection.
> THE COURT: I'll sustain that objection.

Verbatim Report of Proceedings (VRP) (Sept. 24, 2009) at 15. After the jury had been selected[3] and sent out of the courtroom, Vernon moved for a mistrial based on juror 35's statements. The trial court denied the motion, finding that the statement was not unduly suggestive. The trial court found this especially true given that a uniformed custody officer sat four feet from Vernon during voir dire.

We review the denial of a mistrial motion for an abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). We review alleged violations of the right to an impartial jury and the presumption of innocence de novo. *State v. Johnson*, 125 Wn. App. 443, 457, 105 P.3d 85 (2005). Curative instructions can sufficiently overcome any prejudice that might have otherwise arisen from inadvertent observations of a defendant in shackles. *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). When an error can be cured by a curative instruction, a defendant waives the error by failing to request such an instruction. *Rodriquez*, 146 Wn.2d at

[3] Juror 35 was not seated on the jury.

271; *State v. Russell*, 33 Wn. App. 579, 588, 657 P.2d 338 (1983) (argument waived where no curative instruction requested after corrections officer stopped defendant from joining counsel at bench for sidebar), *rev'd in part on other grounds*, 101 Wn.2d 349, 678 P.2d 332 (1984); *State v. Gosser*, 33 Wn. App. 428, 435-36, 656 P.2d 514 (1982) (argument waived where defendant did not request curative instruction, but instead moved for mistrial, after jurors observed defendant's shackles being removed outside courtroom); *State v. Bonner*, 21 Wn. App. 783, 792-93, 587 P.2d 580 (1978) (defendant waived error where he did not request a curative instruction after jury saw defendant handcuffed), *review denied*, 92 Wn.2d 1009 (1979).

Here, Vernon has waived any error by failing to request a cautionary instruction. Although Vernon moved for a mistrial, he did not request a curative instruction. He has thus waived any error. Vernon's argument that the presence of a uniformed corrections officer prejudiced the jury fails for similar reasons.

VI. Sentencing

Sixth, Vernon argues that the sentencing court erred in imposing exceptional, consecutive, determinate sentences. We hold that the sentencing court had authority to impose exceptional, consecutive sentences but that it had a duty to impose an indeterminate sentence under former RCW 9.94A.712.

The State requested an exceptional sentence of 60 months on each count to be served consecutively. The State based its request on Vernon's multiple offenses and 9+ offender score.[4] Based on this offender score, Vernon's standard range was 43–57 months to 60 months on each

[4] The sentencing court asked, "How plus is it?" and the State responded, "I believe with both makes it 15." VRP (Nov. 18, 2009) at 185.

count. The sentencing court imposed an exceptional sentence of 60 months on each count, the statutory maximum, to be served consecutively. The sentencing court based its decision on the fact that Vernon's offender score made "Count II essentially a free crime." VRP (Nov. 18, 2009) at 189. Additionally, to the extent that it could make the finding without a jury, the sentencing court based its ruling on the short period of time between Vernon's release from prison and his reoffense. The sentencing court also found that it would impose the same sentence if only one of its bases is valid.

Upon finding that an offender is subject to an indeterminate sentence under former RCW 9.94A.712, the sentencing court shall impose a maximum term and a minimum term. Former RCW 9.94.712(3)(a). The maximum term shall consist of the statutory maximum sentence for the offense. Former RCW 9.94.712(3)(b). The minimum term shall be either within the standard range for the offense, or outside the standard range pursuant to former RCW 9.94A.535 (2008), if the offender is otherwise eligible for such a sentence. Former RCW 9.94.712(3)(c)(i). Vernon was subject to sentencing under former RCW 9.94A.712(1)(b) because he had previously been convicted of a most serious offense (second degree rape) and was being sentenced for a sex offense, voyeurism. Former RCW 9.94A.030(32)(a) (2008).

A. Exceptional Sentence

Vernon argues that under RCW 9.94A.712, the sentencing court had no authority to impose an exceptional sentence. Our Supreme Court has already held that a sentencing court can impose an exceptional minimum sentence when sentencing an offender to an indeterminate sentence. *State v. Hughes*, 166 Wn.2d 675, 688, 212 P.3d 558 (2009). In addition, we reject

Vernon's argument that *Blakely*[5] requires a jury to find that the short period of time passed between his release from confinement and the current offense justified an exceptional sentence. *State v. Clarke*, 156 Wn.2d 880, 894, 134 P.3d 188 (2006) (holding that *Blakely* does not apply to an exceptional minimum sentence imposed under the indeterminate sentence statute if the sentence does not exceed the statutory maximum sentence imposed), *cert. denied*, 552 U.S. 885 (2007). Thus, the sentencing court had authority to impose an exceptional minimum sentence under former RCW 9.94A.712, via former RCW 9.94A.535, even though Vernon was being sentenced as a non-persistent sex offender.

B. Consecutive Sentence

Vernon also argues that the sentencing court had no authority to impose consecutive sentences. We have held that a non-persistent sex offender being sentenced to an indeterminate sentence is subject to consecutive sentencing. *State v. Woodruff*, 137 Wn. App. 127, 132, 151 P.3d 1086 (2007).[6]

C. Indeterminate Sentence

We agree with Vernon that, under former RCW 9.94A.712, the trial court must impose an indeterminate sentence.

"We review questions of statutory interpretation de novo and interpret statutes to give effect to the legislature's intentions." *State v. Bunker*, 169 Wn.2d 571, 577–78, 238 P.3d 487

[5] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[6] The *Woodruff* court evaluated former RCW 9.94A.712 (2004). *Woodruff*, 137 Wn. App. at 132. But as far as exceptional sentences are concerned, under the facts of this case, there is no difference between former RCW 9.94A.712(3) (2004) and former RCW 9.94A.712(3) (2006).

(2010). When interpreting a statute, we first look to its plain language. *Bunker*, 169 Wn.2d at 578. If the plain language is subject to only one interpretation, the inquiry ends because plain language does not require construction. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003).

A sentencing court *shall* impose an indeterminate sentence when an offender has been convicted of a serious violent offense and is being convicted of a sex offense other than failure to register. Former RCW 9.94A.712(1)(b), (3)(a). The trial court, then, had a mandatory duty to impose an indeterminate sentence. *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 82, 605 P.2d 1265 (1980) (as a general rule, the use of the word "shall" in a statute is mandatory and operates to create a duty).

As we stated above, the sentencing court could also impose an exceptional minimum sentence pursuant to former RCW 9.94A.535. But the sentencing court had to consider both former RCW 9.94A.712 and former RCW 9.94A.535 when imposing an exceptional minimum sentence upward. *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010) (this court interprets statutes so that all language used is given effect, with no portion rendered meaningless or superfluous); *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (in determining the plain meaning of a provision, this court looks to the statutory scheme as a whole).

Interpreting former RCW 9.94A.712 and former RCW 9.94A.535 together, the sentencing court could impose an exceptional minimum sentence, as long as it still imposed an indeterminate sentence. That is, the sentencing court could impose an exceptional minimum, so long as it was less than the statutory maximum of 60 months. For example, had the trial court imposed an

exceptional minimum sentence of 59 months, it would have properly imposed an indeterminate sentence. To read the statutes otherwise would permit the sentencing court to ignore its mandatory duty under former RCW 9.94A.712 to impose an indeterminate sentence. *See also Hughes*, 166 Wn.2d at 688 n.14 (noting that sentencing court had authority to impose exceptional minimum sentence and had legislature intended to prohibit indeterminate exceptional minimum sentences or convert them to determinate sentences, it would have made those alterations explicit).

We hold that (1) the sentencing court had authority to impose exceptional minimum, consecutive sentences on a non-persistent sex offender being sentenced under former RCW 9.94A.712; but (2) reading former RCW 9.94A.712 and former RCW 9.94A.535 together, the sentencing court erred in imposing a determinate sentence. We remand for resentencing with instructions to impose an indeterminate sentence.

D. Offender Score

In addition, Vernon argues that the sentencing court incorrectly calculated his offender score because his 1994 conviction for failing to register as a sex offender was not a felony, though he cites no authority for this argument. This argument is premature because we are remanding for resentencing and the sentencing court will likely calculate his offender score again. *Hughes*, 166 Wn.2d at 688.

VII. Crime Related Community Custody Conditions

Seventh, Vernon argues that several of his community custody conditions are not crime related. Although this argument is also premature, we reach this argument because it is likely to

occur again on remand.

During sentencing, Vernon objected to several proposed community custody conditions. Vernon objected to the prohibitions against having contact with minor children and using or possessing alcohol because his offense did not involve either. He also objected to the requirement that he allow the Department of Corrections access, for the purpose of a visual inspection, to the residence in which he lives or has exclusive or joint control or access; he claimed the condition was overly broad and should exclude private areas in a residence that are exclusively occupied by non-offending persons. The sentencing court found the challenged community custody conditions appropriate without explanation.

As part of any indeterminate sentence under former RCW 9.94A.712, the sentencing court shall sentence the offender to community custody. Former RCW 9.94A.712(5). As part of any term of community custody, the sentencing court may order an offender to refrain from direct or indirect contact with a specified class of individuals, refrain from consuming alcohol, or comply with any crime-related prohibitions. Former RCW 9.94A.700(5)(b), (d)-(e) (2003); former RCW 9.94A.712(6)(a)(i).

Vernon's crime did not involve minors, so the community custody condition prohibiting contact with minors was improper. *State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Sanchez Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). The requirement that he abstain from alcohol need not be crime related. *Riles*, 135 Wn.2d at 350; *State v. Jones*, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003). Vernon's challenge to inspection of his family members' residence is not ripe. Further factual development

is necessary here because Vernon has not yet been released and does not yet live with a non-offending person. *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). We remand for resentencing to strike the community custody condition prohibiting contact with minor children.

VIII. Legal Financial Obligations

Finally, Vernon argues that the sentencing court imposed excessive legal financial obligations when it imposed $4,429 in costs. We do not consider a challenge to incarceration costs when the appellant did not challenge his ability to pay to the trial court. *State v. Snapp*, 119 Wn. App. 614, 626 n.8, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004). Vernon did not object to costs below and has waived this argument.[7]

We remand for resentencing with instructions to impose an indeterminate sentence and to strike the community custody provision prohibiting contact with minor children. In all other respects, we affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Johanson, J.

We concur:

Hunt, J.

Penoyar, C.J.

[7] We note that RCW 10.01.160(4) permits a petition to the trial court for a modification of legal financial obligations based on a manifest hardship.